No. 270.
Grand View Bldg. Ass'n.
By Webster for Respondent.

Office Supreme Court U.S.
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JAMES H. MCKENNEY,

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed March 25, 1901.

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NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DEFENDANT.

JOSEPH R. WEBSTER,
HALLECK F. ROSE,
For Defendant.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

In the Supreme Court of the United States.

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JOSEPH R. WEBSTER and HALLECK F. ROSE, *for Defendant.*

BRIEF OF DEFENDANT.

I.

Statement of the Case.

The suit is at law to recover $2,500 on a policy of fire insurance, the proportionate value of the insured personal property, consisting of furnishings of a boys' military and boarding academy. The answer (11-13) raises no issue as to issuance of the policy, payment of premium, ownership, or destruction by fire of the insured property, or as to making of a proof of loss. The defense pleaded is breach of a

policy condition exempting the company from liability "if the insured has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The fact that there was a subsisting insurance of $1,500 on the same property was disclosed in the petition, and was not put in issue by the pleadings. It was, however, averred and proved that the $1,500 policy was previously written, and was subsisting when plaintiff in error issued the policy sued on. In avoidance of this policy condition it was alleged in the petition (1-3):

Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Fireman's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire.

The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and collect and receipt therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that "it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance" on the property covered thereby. And by the aforesaid

several acts and by procuring, receiving, accepting, and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated.

To the answer, pleading a breach of this policy condition as an affirmative defense, the assured replied (15–16) as follows:

The plaintiff for reply to the answer of defendant herein denies that it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant to plaintiff and without the knowledge of defendant; and alleges that the amount of insurance carried on said property by plaintiff was not in any manner increased after issuing of defendant's policy, or during the term of insurance under defendant's policy. The policy referred to in said answer, of $1,500 in the Firemen's Fund Insurance Company, was, on the contrary, subsisting at and prior to the issuance by defendant to plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt the fact of such subsisting insurance of $1,500; and said Borgelt as

such agent, with full knowledge of said fact, accepted the risk, and wrote, executed, and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor. By all the aforesaid several acts the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy.

The jury, under direction of the trial judge, rendered a special verdict responsive to all the facts pleaded. The value of the insured property was found to be in excess of the total amount of insurance written by both policies. There is therefore no room for contention as to the measure of damages. The special findings, in so far as they relate to the matters pleaded by the assured in avoidance of the policy stipulation forbidding other insurance, are as follows (18–19):

Finding 5. Was there at the time of the issuance of the policy in suit other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of defendant company to issue policies of insurance and how are his pow-

ers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire insurance risks on its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. G. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

The facts being found specially and there being no assignment directed against the sufficiency of the evidence, the court will not be required to examine into the sufficiency of the testimony. But petitioner having injected into his statement an assertion that finding 7 was upon conflicting testimony and that the company's agent, Borgelt, denied any knowledge until after the fire of the other insurance, it is thought proper to set forth the testimony upon that point.

The assured's president, H. J. WALSH, testified (22) that Borgelt, the agent, was a tenant of witness. "The defendant had a previous policy on the water works and power house of the plaintiff but Borgelt informed witness that the defendant objected to the risk and asked Borgelt to cancel the policy, and witness, wishing to favor Borgelt as he was a tenant of witness, told Borgelt that there was but $1,500.00 insurance on the furniture and it would carry $4,000.00. Witness understood from his bookkeeper that there was at that time about $4,800.00 worth of furniture in the building

and Borgelt thought he could write the $2,500.00 additional insurance on the furniture and said he would do so. Witness did not procure any further or additional insurance on the subject of insurance covered by the policy in suit after the date of its issuance. Whatever insurance there was on the property was specified at the time this policy was issued and there was no other or different insurance than that which witness has referred to as having been mentioned to Mr. Borgelt." Burt Richards, another insurance agent, with whom witness carried risks, was requested to look after the matter for witness. Witness accepted the policy from Borgelt, paid the premium therefor, and put it in his safe, without ever having looked at it, and supposed it was like his other policies and never knew of the omission to make the endorsement permitting concurrent insurance until two or three weeks after the fire.

BURT W. RICHARDS testified (24): "Mr. Walsh had asked witness to take a certain policy of the Northern Assurance Company, covering the power plant, to Mr. Borgelt and have Borgelt rewrite it upon the furniture of the plaintiff which owned and operated the Worthington Military Academy and for the reason that the Northern Assurance Company had declined to carry the power plant, and Mr. Walsh had made arrangements with witness to write the insurance on the power plant; witness took the policy in the defendant's company, covering the power plant, and went across to Mr. Walsh's office and laid it on his desk, and said to Mr. Borgelt, 'Mr. Walsh has decided to let you place this policy on the furniture in the Worthington Military Academy, and I will write the power plant myself, inasmuch as your company won't carry it; so you write this up on the furniture concurrent with our policy of $1,500 on the furniture now.' The $1,500 policy referred to was in the Firemen's Fund, and witness had been the solicitor that had obtained the order for that $1,500 policy."

On cross-examination of the agent BORGELT, called as a

witness for the Insurance Company (25), he testified: "We talked to Mr. Walsh about the policy in his office, having previously gone to Mr. Walsh's office to inform him of the cancellation of the other policy, and at that time he told Mr. Walsh that he would like to have him place other insurance with him, and that he would like to carry the risk covered by the policy in suit. Witness was at that time a tenant of Mr. Walsh's building, with an office on the same floor with Mr. Walsh. The policy in suit was written after the cancellation of the previous policy on the power house of the Grand View Building Association. The power house policy was not ordered by Mr. Walsh, but was ordered by Mr. Richards from the Farmers and Merchants Company, and the talk witness had with Mr. Richards was about the power house policy. During the conversation between witness and Walsh, Walsh told witness he could have the insurance on the furniture. The policy was in the same amount and the premium was the same that was charged upon the power house policy. Witness does not remember that Walsh said anything to him about having $1,500 on the furniture, and that it would carry more, but he might have mentioned it."

It can hardly be contended, in view of the admission made by the agent, Borgelt, on cross-examination, that the assured may have informed him of the existing insurance of $1,500, that the seventh finding by the jury was based upon conflicting testimony. It certainly is conclusively shown that the assured acted in the utmost good faith, and on its part performed every act that in ordinary business transactions of this character could have been required of it. The collection and retention of the insurance premium, under these circumstances, certainly renders it unconscionable and even odious on the part of the insurer to insist for the first time after the destruction of the property by fire that no contract of insurance ever existed.

The record presents for decision the single question whether the company may successfully urge a breach of the policy condition mentioned, as a defense to liability on its policy issued with knowledge beforehand of the existing insurance, and after the assured had made a report thereof to the company's recording agent, who subsequently issued the policy and collected full premium from the assured.

II.

ARGUMENT.

Where an insurance agent with authority to accept risks, receive premiums, and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the insured property, the company is estopped after loss to insist that the policy is void because consent to such concurrent insurance was not given in writing. Knowledge of the agent in such case will be imputed to the company and that which the insurer knew when engaging in the venture, it will be presumed to have assented to.

The vital point in the case was stated in the majority opinion of the circuit court of appeals by Judge THAYER, as follows: "The general question which arises in this case is whether an insurance company should be permitted to take advantage of a condition contained in one of its policies to avoid the payment of a loss that has been sustained thereunder when it appears that the fact rendering the policy void by the terms of the condition which is pleaded as a defense, was an existent fact known to the insurer at the time it issued its policy, and accepted the premium, which for

that reason rendered the policy void, if at all, from the moment it was delivered." (Printed Record, pp. 38-39.) The findings of the jury heretofore quoted sufficiently state the facts on the record to refer to the court the decision of this question of law. The courts of the country generally, including the constituted federal tribunals inferior to this court, have for many years and with great unanimity resolved this question in favor of the insured and against the insurer. The modern doctrine is a departure from the precedent established almost sixty years ago in the case of *Carpenter v. Providence-Washington Insurance Co.*, 16 Pet., 495-512. It is not surprising, in view of the authoritative force of the opinions of this court, and the very great eminence of the late Justice STORY, who delivered the opinion in *Carpenter's Case*, that even at this day, there remain some differences of opinion among the circuit judges, justifying this court in exercising its extraordinary powers by granting the writ of certiorari, in order that it may determine between the earlier and the more modern doctrine, and announce its conclusion in the interest of uniformity of decision for the guidance of the circuit judges.

This case is clearly distinguishable from those in which the act of forfeiture is subsequent to the issuance of the policy Here we have to do only with a condition precedent, the enforcement of which renders the policy void and inoperative, if at all, from the date of its issue. If the doctrine of estoppel invoked cannot apply, then the contract sued on must be adjudged never to have had any valid existence, and the rights of the parties are the same as if no policy had ever issued. The assured will then be presumed to have paid his premium for nothing, as a mere donation to the company, without its carrying any hazard. The company

will, under this doctrine, be presumed to have merely accepted the insurance premium in silence, knowing that it parted with no value. Had there been no fire, the company, on its theory, would have kept the premium and have carried no risk. On this theory there is no escape from the conclusion that the insurer was in fact deceived and defrauded, nor that the company purposely confidenced him to the extent of the premium money paid. The facts found by the jury of record, which throw upon the court the duty of passing upon the question of law, establish conclusively the knowledge of the company beforehand of the existing $1,500 policy underwritten by the Fireman's Fund Insurance Company. Had this been the conscious purpose of both parties, then there would have been no need to have put forth the written contract of indemnity signed by the company. The only office of that paper was, under this view, as a device to conceal from the assured the real fact that the company was obtaining the premium without consideration. This doctrine vests in the insurer the power of keeping the premium in case no loss accrues during the term and of escaping liability by returning the premium if a loss shall occur—a power no longer claimed by reputable underwriters anywhere.

It not infrequently occurs that insurance companies making use of the standard form of policy, the form that was employed in this case, increase the amount at risk by issuing new policies upon the same subject of insurance without endorsement of permission upon the first policy, and without making any record thereof upon the recording agent's books. A cause was recently tried in the court where this case originated, where the facts developed that the insurance company issued two policies, one June 9, 1900, and one

September 6, 1900, each for the term of one year; both policies contained a stipulation forbidding other insurance and rendering them void unless consent thereto was endorsed. The insured property was burned at a period when both policies were in force. It was the manifest intention of the company to carry an increased insurance by writing the second policy. The strict construction contended for in this case by the insurer would, in that case, have worked a forfeiture; for the clause here under consideration makes no exception of cases where the additional insurance is taken out at a subsequent date in the same company that issued the first policy. Yet a lawyer of respectability would hardly contend that the policies in the case mentioned had been forfeited by reason of the failure to endorse consent to concurrent insurance in writing upon each policy, notwithstanding that no agent of the insurance company was authorized to change the existing conditions except by writing endorsed upon the particular policy. In such case the mode of acting is not the measure of the agent's authority. The company would be conclusively presumed to have assented to the increase of the insurance, so long as it was itself carrying both policies. The doctrine of estoppel would in such case be effective to prevent the insurer's taking any advantage from the violation of the policy conditioned forbidding other insurance. The case given by way of illustration may not be entirely analogous to that under consideration, yet it involves a similar principle. The business of underwriting is usually entrusted to a person who represents in the same office a number of companies—sufficient to enable him to carry large lines by dividing the risks among the different companies of his agency. It often happens that such agents, when acting in the utmost good faith, omit the written en-

dorsements required by the policy conditions for the carrying of concurrent insurance and that the record of the various policies, spread upon his own register, shows he put forth contracts that, under the rule contended for by the insurer here, never had any existence as binding obligations, notwithstanding the payment of premium and that the policies were intended to take effect at the same moment of time and to be in force for the same term. That was in effect the case here. The assured entrusted the readjustments of his policies to two insurance agents, both of whom knew and were fully advised of the existence of the policy, the previous issue of which is now claimed to work a forfeiture. In such case, the knowledge of the agent entrusted with the power to underwrite the policy, and pass upon the risk and collect the premium, is held to be the knowledge of the company. The issuance of the policy under such circumstances would be a mere idle formality, unless the company intended to carry its portion of the risk concurrently with the other insurers of whose policies it had notice at the time of the execution of its own.

There is no merit in the argument against the application of the doctrine of waiver, based on the fact that its application here involves a holding that the waiver of the condition took place concurrently with the issuance of the policy. The converse of the contention made by counsel is, in fact, true. It is impossible that there could be a waiver of a condition precedent to the attaching of the risk made at any time subsequent to the delivery of the policy. A condition precedent must necessarily affect the validity of a contract, if at all, at the very date of the inception of the contract. If the condition depended upon a subsequent act, then it would not be a condition precedent. The general terms of

policies in use by underwriters are drafted to cover, in a single form, almost every condition that may affect any subject of insurance. Necessarily in almost every policy there are many conditions entirely inapplicable to the subject of the particular risk. For example, in every policy insuring merchandise there are provisions relative to the subject matter of buildings, or real estate, that are intended by the insurer, in advance, to be disregarded or waived, or held wholly inapplicable to every risk other than the class to which they could apply. It not infrequently happens that the ordinary insurance policy, intended to be issued first hand by the first insurer, is used as a re-insurance contract. In such case the forfeiture conditions that would be applicable in favor of the original insurer are disregarded, and the contract held operative only so far as its provisions may reasonably be regarded as germane to a contract of re-insurance. Here, again, the policy stipulations, which from their nature could not reasonably apply to the subject matter of the contract or risk intended to be made or assumed, are treated as waived or as surplusage. The contract of insurance sued on in this case is not an instrument drafted deliberately, after negotiation for a specific contract, and submitted to both parties for execution. On the contrary, it bears the signature only of one of the parties, and embodies many stipulations and provisions not applicable to the subject matter of the particular risk. The form was prepared by the insurer and not by the assured.

It would be manifestly against public policy to permit the insurer under such circumstances to collect premium from the assured under the guise of affording indemnity, and at the same time put forth a contract that on its face was void and of no force or validity. The doctrine of estoppel, held

by the circuit court of appeals, rests upon high grounds of public policy and business morals. Where the company accepts the premium money in silence and leads the assured by its conduct to pay the same in faith of the indemnity offered, it should not, after a loss occurs, be permitted to urge a forfeiture by reason of existing insurance known to it and assented to at the time it went into the venture. In such case, the application of the doctrine of estoppel is obvious and altogether just. A real owner is often precluded from disputing title when by his acts he allows it to appear that the real title is vested in the party making the sale. There is no distinction in principle between such cases and those which hold an insurance company estopped from setting up facts in avoidance of its contract which were obvious and known to its agents when the contract was made.

In view of the finding of the jury that Borgelt was a recording agent with authority to issue policies and accept fire insurance risks and collect and receive premiums therefor, it is not deemed necessary to discuss at great length the point made by counsel for the company, based on the assumption that Borgelt was an agent with limited powers. Under the special findings, it is evident that the agent here was authorized to exercise all the powers of the company with respect to risks. What might have been the rule had he been a soliciting agent we need not inquire. The powers defined in the findings are general and not restrictive powers. Borgelt stands for the company in all things regarding underwriting and represents all its powers of contracting risks. All the assured is interested to show in this case in order to sustain his contention is that Borgelt was vested with power to accept the risk with or without concurrent insurance. He was the examiner passing upon the risk, through whom

alone the company could be affected with notice of other insurance then subsisting. If this power be a restricted or limited one, it is, nevertheless, the only power which the circumstances of the assured's case required the agent to exercise.

The authorities hereafter cited will indicate how the text-writers and the courts of the country, state and federal, have held upon the contention of the assured, as heretofore stated and argued.

Before proceeding, however, to collate the authorities, we wish to contest the further contention of the counsel that the assured should be denied relief here because the action is at law rather than in chancery. This contention is also based on the rule in the *Carpenter Case*, where the court instructed the jury that "at law, whatever might be the case in equity, mere parole notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on." In so far as the *Carpenter Case* speaks on this question, the rule announced seems to rest largely on the recognition of the chancery court as a distinct forum, having the exclusive power to grant relief in cases of this character. There is no reason for the application of that rule to this particular case. This case originated in the district court of Lancaster county, Nebraska. By federal statute, therefore, the laws of Nebraska are to be regarded as the rules of decision in the trial of the case at common law in the courts of the United States (Rev. St. U. S., sec. 721). In this jurisdiction, the practice is regulated by the code of civil procedure, section 2 of which is as follows:

Sec. 2. The distinction between actions at law and suits in equity and the form of all such actions and suits heretofore

existing are abolished and in their place there shall be hereafter but one form of action, which shall be called a civil action.

It is not contended that by this statute the distinction between common law and equity is entirely abolished; but, under the code, relief in cases of this character is, in the jurisdiction where the case originated, granted in an action at law. (*Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German-American Ins. Co. v. Covey*, 41 Neb., 728; *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566). The rules of practice prescribed for the state courts being such as to permit the granting of relief in the action in the form in which it was instituted, the company that removed the case has no standing to claim a reversal on the question of practice alone, where such contention to prevail would involve a departure from the rules of practice of the state court.

THE FEDERAL DECISION.

This court in the case of *Insurance Company v. Wilkinson*, 13 Wall., 232-236, in a well-considered opinion by Mr. Justice MILLER, held that where an insurance agent soliciting insurance prepares the application of the insured, he is the agent of the insurer and that, although the application be signed by the assured, he is not bound by false statements embodied therein. It was further held that in such case the insurer cannot protect himself by limitations upon the agent's authority to the effect that he is only agent for the purpose of receiving and transmitting the application and the premium. The doctrine of estoppel was held to apply against the insurer and oral testimony was held admissible. This court held in favor of the modern or advanced doctrine

applicable to the business of underwriting and repudiated the earlier doctrine. In the opinion (pp. 233-236) it is said:

It is in precisely such cases as this that the courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal. * * *

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting his eyes to it, that in-

surance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said and done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, lead, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agents are, *prima facie*, coextensive with the business intrusted to his care, and will

not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.

In the fifth edition of the American Leading Cases, after a full consideration of the authorities, it is said: "By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not infrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers." The modern decisions fully sustain this proposition, and they seem to be founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

In *Insurance Company v. Norton*, 96 U. S., 234–244, the company claimed the forfeiture under its policy conditions on account of the non-payment of the premium note. This court in that case held, however, that the forfeiture condition could be waived by the company; that the declaration contained in the policy to the effect that the agent had no

power to make agreements to waive forfeiture was not conclusive and the parole evidence was admissible, notwithstanding the policy condition, to establish a waiver. In the opinion by Mr. Justice BRADLEY, it was said:

The written agreement of the parties, as embodied in the policy and the endorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purpose that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to wai 'e a condition or stipulation made in its own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing. * * *

Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in *Statham's Case* (93 U. S., 24), that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given,

the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

Eames v. Home Insurance Company, 94 U. S., 621-630, was an action in chancery to decree execution of a policy and enforce payment of a loss. The opinion discussed and ruled upon the point involved here. Among the defenses were an alleged misrepresentation of title and the existence of collateral insurance incorrectly stated in a written application, signed by the assured. It appeared, however, that the facts had been fully reported to the company's agent. The knowledge of the agent was held to be the knowledge of the company and the insurer was held bound by his acts. In the opinion delivered by Mr. Justice BRADLEY, it was said:

As to the objection that the application in this case does not truly set forth the title of the complainants and the amount and nature of the incumbrances on the property, and the amount of insurance in other companies, it is sufficient to say that the evidence abundantly shows that all the facts were fully and frankly communicated to Beach, the agent of the company, and were indeed known to him before; and that he wrote down the answers according to his view of their bearing and legal effect, Eames relying entirely on his experience in such matters. There is no reason to suppose that either Eames or Beach did not act in entire good faith in the transaction. And, indeed, it cannot be pretended that the facts were not substantially as represented in the application. The complainants are represented to be the owners of the property, which is stated to be subject to a mortgage for $6,000. The fact was, that they had purchased the property for $12,000, and had paid $6,200 of the purchase money, the vendor having a lien for the balance of $5,800; but no deed had ever been given. So that, in truth, the complainants did not hold the legal

title, although they had an equitable one; and had not given a mortgage, although the vendor's lien was equivalent to one. In another answer, however, explaining the mortgagee's interest, it is stated expressly to be a "lien on mill to secure payment of sale." As the exact facts were communicated to the agent, and he took the responsibility of stating them in the way he did, leading the applicant to suppose that it was all right, we think it would be great injustice to turn him out of court now for this inexact method of statement. According to the views expressed by this court in *Insurance Company v. Wilkinson*, 13 Wall., 222, and other more recent cases, the defendant was concluded by the act of its agent. The reference to collateral insurances in other companies is subject to the same consideration. The insurances were being applied for through this very agent who wrote the answers, and who knew the whole facts, and between whom and the general agent they had been referred to in their correspondence. The defense on this ground is utterly destitute of equitable consideration.

Hartford L. & A. Ins. Co. v. Unsell, 144 U. S., 439–451, was a case of delayed payment of a renewal premium under a policy conditioned that it should be inoperative unless the renewal premium was paid on a given day. Notwithstanding the policy condition, the jury was permitted to render a verdict against the company on the ground that the company had waived the policy condition. The instruction reviewed, and the ruling of this court, sufficiently appear in the following quotation from the opinion written by Mr. Justice HARLAN:

But the part, and the only part, of the charge to the jury to which the defendant excepted was in these words: "But the plaintiff says, that beyond these receipts of money after the day specified there were instances in which money was received without any such notice. Now the question comes

up in respect to that, was there such a continuance of business, was the whole course of business, from the commencement to the close, such that from this and that, and from all the receipts and all the transactions he had a right to believe and did believe that the question of health even would not be considered, and that it would be willing to take his money shortly after it had become due without inquiry as to his health? If so, that makes a waiver. If the company, by its conduct, led him, as a reasonable and prudent business man, to believe that he could make payments a few days after, sick or well, it cannot turn around now and say, 'You did not pay at the time.' I cannot say to you, as a matter of law, that one receipt, after the time specified, would make a waiver, or that fifty would. It is not in the numbers. The question is for you to consider and determine from all of them and from the whole course of business, whether, as a prudent business man, he had a right to believe that it was immaterial whether he paid on the day or a few days later. If the course of conduct was such that he had a right to believe that he could pay only in good health, then there was no waiver applicable to the case at bar. It must have been such a course of conduct as would lead a reasonably prudent man to believe that the company was willing to take payment, sick or well."

The law applicable to the case was stated to the jury with substantial accuracy. It is a mistake to suppose that the charge was inconsistent with the principle announced in *Thompson v. Knickerbocker L. Ins. Co.*, or in any other case decided by this court. In the case of *New York L. Ins. Co. v. Eggleston*, 96 U. S., 572, 577 (24:841, 843), Mr. Justice BRADLEY, speaking for the court, said: "We have recently, in the case of *Knickerbocker L. Ins. Co. v. Norton*, 99 U. S., 234 (24:689), shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on

the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is therefore estopped from enforcing the forfeiture."

While this court has not, since the decision in *Carpenter's Case* in 1842, followed that precedent upon the point involved in this case, it has in many cases and in particular those above cited, announced doctrines altogether inconsistent with that decision. In *Wilkinson's Case* (13 Wall., 232) it has expressly approved of the introduction in modern times in courts of law of the doctrine of equitable estoppels. In *Eames's Case* (94 U. S., 621) which was in chancery, it was held that collateral insurance was no bar to a recovery when the agent who took the application was the same agent through whom the collateral insurance was obtained and who knew the whole facts. In *Norton's Case* (96 U. S., 234) it was held that the declaration contained in the policy limiting the power of the agent was not conclusive and the powers might be extended by parol proofs; and in effect the same doctrine was re-affirmed in *Unsell's Case* (144 U. S., 439). In *Wilkinson's Case* the opinion is expressly a departure from the earlier doctrine announced in *Carpenter's Case*, although *Carpenter's Case* is not specifically mentioned or overruled. In the case at bar, the failure to make the endorsement in writing upon the policy, permitting concurrent insurance, was the company's own fault and not the fault of the assured. It is, therefore, not surprising that the circuit court and the circuit court of appeals have, in view of the decisions above referred to, refused to declare a for-

feiture where the grounds on which the forfeiture is asserted are based upon the neglect of the company's own agent. Nor is it strange that the inferior courts have treated the holding in *Carpenter's Case* as obsolete. With this review of the decisions of this court, we present the cases in the federal courts inferior to this court.

In *Putnam v. Ins. Co.*, 18 Blatch., 368, 4 Fed., 754, Mr. Justice BLATCHFORD (then circuit judge) held in the Northern District of New York that the delivery of a policy with knowledge by the agent of existing insurance was a waiver of the provision of the policy prohibiting additional insurance; and on findings similar to those made by the jury here, judgment was rendered against the insurance company. The case is well considered and is of value because of the great learning of the judge who made the ruling. We find no intimation that during his subsequent service on the supreme bench he ever renounced the views there expressed upon this subject. In the opinion it is said:

On the whole evidence the case is not one for disturbing the finding of the referee that the fact of the existence of the $6,000 other insurance was known to the agent of the defendant when he delivered the policy in suit to the plaintiff. This fact being so, it must be held that the conclusion of law thereon by the referee was correct. The case of *Whited v. German Fire Ins. Co.* (76 N. Y., 415), decided in March, 1879, is a direct authority in point. The policy there contained provisions that, if the property should be sold or if the interest of the assured should not be truly stated, the policy should become void; that any less than a distinct specific agreement endorsed on the policy should not be construed as a waiver of any condition therein; and "that any person other than the assured who may have procured the insurance to be taken shall be deemed to be

the agent of the assured and not of the company under any circumstances whatever or in any transaction relating to this insurance." The policy was issued in 1869, signed by the officers of the company and countersigned "O. J. Harmon, Agent," and was for one year. In 1870 it was renewed for one year, the renewal certificate being signed by the officers and containing the words "not valid unless countersigned by the duly authorized agent of the company at Oswego" and being countersigned there "O. J. Harmon, Agent." Like proceedings took place on a renewal in 1871 for one year. During that year the plaintiff conveyed the premises and took back a mortgage on them. Before the year expired, he applied to Harmon for a renewal and then told Harmon, "the person who had as defendant's agent countersigned the policy and the two renewal certificates," that the premises had been sold and to whom and showed him the mortgage and paid the premium. Harmon said to the plaintiff that he would "make it all right" and gave him a renewal certificate signed and countersigned like the former ones. Harmon was the duly authorized agent of the company at Oswego and did all the business of it there, except settling losses. In the present case, Carr says: "I received applications for policies and had authority to write and issue policies without writing to the company." In the *Whited Case*, the interest of the plaintiff in the premises as a mortgagee was not stated in the policy or in the renewal certificates. The defendant contended that the policy was void. The plaintiff contended that there had been a waiver of the requirement that the change of interest of the plaintiff should be endorsed on the policy. The defendant replied that Harmon could not bind the defendant by any such waiver. The court says: "Upon the facts in the case, as stated by the verdict, there was a parol waiver of the conditions rested upon by the defendant and a parol consent to keep on foot the insurance of the plaintiff in his new status of mortgagee; that Harmon was the agent of the defendant in the dealing for the last renewal and not the agent of the plaintiff." (*Fish*

v. Cottenet, 44 N. Y., 538; *Shearman v. Niagara Fire Ins. Co.*, 46 Id., 526; *Pechner v. Phœnix Ins. Co.*, 65 Id., 195; *Van Schaick v. Niagara Fire Ins. Co.*, 68 Id., 434; *Bidwell v. No. West Ins. Co.*, 24 Id., 302.)

In *Glover v. National Fire Ins. Co.*, 30 C. C. A., 95-103, the circuit court of appeals for the fourth circuit held that an insurance company is estopped to rely on a mis-description of a property, when the application was prepared by its agent, who had authority to issue the policy and who knew the actual facts concerning the property. The subject of the insurance was reported to the company by its own agent and described in the policy as a dwelling. It was, in fact, a Keeley Institute. Proof was offered to show that the character of the occupancy was known to the agent at the time he wrote the policy and the point was made that the company, having knowledge of the facts before it issued the policy, was estopped to claim a forfeiture because the risk was more hazardous in fact than that described in the application and the policy. In the opinion commenting on the rule that an insurance company is estopped from asserting the invalidity of its policy from date of issue for violation of conditions, if the fact of such violation was known to the company or its duly authorized agent, the court said:

This principle, which seems to have the sanction of all the writers on insurance, is consonant with sound reason. All of the business of insurance is done through agents, who are presumed to know and do know better than the community at large, the requirements of their companies. A party seeking insurance must ordinarily depend upon the agent for the proper preparation of the requisite papers and, if he neither misrepresents nor conceals any essential fact and the agent, having opportunity of knowing, acts upon his own knowledge and fails to describe properly the prem-

ises insured, it would be an intolerable hardship that such party, who is without fault himself, should suffer from the omission or negligence of the company's agent and that the company, which has taken his money and issued to him a policy void from the beginning, should be allowed to shelter itself under the letter of the contract and the insured not be permitted to show the truth of the transaction. The general practice is for the party seeking insurance to make out his application and this is considered a part of the policy. This was not required or done in the case under consideration. The plaintiff was not asked to describe the property and it is not claimed that he omitted to give any information or that the misdescription was his act. The word "dwelling" is not free from ambiguity. In a certain sense, any house in which people dwell might be considered a "dwelling." That a higher premium would be charged on a house where patients of a Keely cure were entertained, was a fact peculiarly within the knowledge of the insurance agents. It is not a matter of common knowledge and the plaintiff has testified that he did not know it. The description was written by the company's agent. The testimony shows that the policy was made out after the plaintiff had left the city and was never seen by him until after the fire. It is true that it was left with Mr. Carter, who was in a sense his agent, as well as attorney for the Jacksons, and that any knowledge that Carter would obtain from inspection of the policy would be imputed to the plaintiff; but it does not seem to us that it would be any relaxation of the good and wholesome rules which require integrity and fair dealing and openness of conduct on the part of the insured, as well as upon the part of the insurers, to hold that the plaintiff was entitled to show by parol that the agents, at the time the policy was written, were acquainted with the use which the plaintiff was making of the premises insured and, if so, that the company was estopped from setting up such use in avoidance of its liability.

Under the general principle of estoppel in pais, persons

innocently induced to acquire rights in derogation of secret or undisclosed claims of those who induce such action, are secure in the rights so acquired. A real owner is often precluded from disputing title when by his acts he allows it to appear that the real title is vested in the party making sale. There can be no real distinction between such cases and those which would hold an insurance company estopped from setting up facts in avoidance of its contract, when such facts were obvious and were known to its agents when the contract was made. That oral testimony may be properly offered to prove facts tending to create estoppels of this nature is well settled in numerous cases of the highest authority. In *Ins. Co. v. Wilkinson*, 13 Wall., 222, there was a suit upon a life insurance policy. It was not denied that the application upon which the policy was issued, contained a representation of a matter material to the contract, that it was signed by the party, and that it was untrue, the applicant having signed a paper stating that the mother of the insured had died of fever at the age of 40, when, in fact, she had died of consumption at the age of 23. Testimony was offered and admitted that the plaintiff had said that he had no knowledge on this particular subject of inquiry, and the representation was made out by the insurer. The court held that it would be an act of bad faith and of the grossest injustice and dishonesty to avoid the policy because of this statement, and Mr. Justice Miller, with his accustomed force and clearness, states the grounds upon which oral testimony may be offered, not to contradict a written instrument but to show that it cannot be lawfully used against him. This case is cited by Mr. Justice Bradley in *Eames v. Ins. Co.*, 94 U. S., 621, a fire insurance case where the agent, being acquainted with the exact facts, stated them inexactly, leading the applicant to suppose that it was all right. The court held that it would be great injustice to turn him out of court for this inexact method of statement. In *Ins C. o. v. Mahone*, 21 Wall., 152, the supreme court sustains the rule of the court below as to the admissibility of parol testimony to show that the answer

to a certain inquiry propounded by the insurance company's agent, was different from that taken down by the agent and signed by the insured. True answers having been made in fact, the company was not permitted to set up as a warranty the answers put down by its agent, although signed by the assured.

In *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A., 136, it was held in the circuit court of appeals for the eighth circuit that where the agent issuing the policy had knowledge of the purpose of the assured to take out other insurance, the company would be estopped by the knowledge of its agent, acquired previous to the issue of the policy, to claim a forfeiture under the policy condition of the standard form of policy forbidding other insurance. It is true that the facts of the Norwood case were not such as to necessarily call for the application of the principle contended for in this case. There the policy was a valid and subsisting contract when issued, and the fact on which the forfeiture was claimed was procuring of insurance subsequently in excess of that permitted by the endorsement. The claim of forfeiture in that case rested, therefore, upon the subsequent act of the assured himself. We must confess our doubt as to the propriety of extending the rule in that case so as to make it applicable to insurance subsequently procured by the act of the assured. In most jurisdictions a distinction is made between the cases where the additional insurance is subsisting and known to the agent writing the policy and cases where it is afterwards procured. In the former case the company induces its patrons to part with the premium money in faith of the indemnity offered, retaining the consideration till after loss; so that the application of the doctrine of estoppel is manifest and is now universally held in

order to avoid the fraudulent issuance of a policy known to be void at its inception. In the latter case, however, of insurance taken out subsequently, the policy is valid in its inception, and it is a subsequent act of the insured that avoids the policy. We are convinced that in the latter case the right of the company to contract against subsequent increase of insurance may well be upheld without conflicting with the rule universally applied in the former case. There was a minority opinion in *Norwood's case*, contending for a recognition of this precise distinction. The opinion by CALDWELL, circuit judge, in *Norwood's case*, contains an extended discussion of the authorities and supports the doctrine of estoppel, which was, in fact, applied in the case at bar. He shows that the earlier doctrine, as announced in *Carpenter's Case*, has been repudiated by the courts of the country, including the court rendering that decision; and that, while the state courts formerly held to the doctrine of *Carpenter's Case*, they have now all yielded to the modern doctrine, except Massachusetts and Rhode Island. The Rhode Island court in the last case before it (*Reed v. Ins. Co.*,24 Atl., 833), held to the rule solely on the ground that the previous decisions of that state had committed the court to that doctrine, and in the opinion used the following language: "But however this may be, we recognize the tendency of decision in favor of the insured, and, if it were a new question in this state, we might feel compelled to yield to the weight of authority.

We quote the following from the opinion of CALDWELL, C. J. (16 C. C. A., 140):

It is contended that consent to other insurance can not be proved by oral evidence: First. Because the policy provides that it shall be in writing endorsed on the policy; and

Second, because it would violate the rule against the reception of oral evidence to contradict or vary a written instrument. But it has been authoritatively decided that a contract of insurance is not within the statute of frauds and may be by parol (*Commercial Ins. Co. v. Mutual Ins. Co.*, 19 How., 318; *Insurance Co. v. Shaw*, 94 U. S., 574; *Henning v. Ins. Co.*, 2 Dill., 26; Fed. Cas. No. 6, 366); and if it can be made by parol, it can be varied by parol. Parties to contracts can not disable themselves from making any contract allowed by law in any mode the law allows contracts to be made. A written contract may be changed by parol and a parol one changed by a writing, despite any provision in the contract to the contrary. * * * Nor can parties by their contracts deprive themselves of the right to prove their cause of action or defense by any species of evidence which the law declares to be competent and legal. The application of this doctrine is not always invoked in the interest of the insured. It is applied for the protection of the insurer as well. * * * Parol evidence that the company had knowledge of and consented to other insurance is not introduced to contradict or vary the written conditions. It is everyday practice to receive parol evidence to establish or overthrow written instruments, or to show that some claim based thereon has been waived by the party claiming under it, or that he has so acted towards the other party that he is estopped from setting up the claim. In all cases the existence of the contract is neither denied nor its terms sought to be varied by parol. The condition in this policy is admitted, but the insured says the insurance company, by delivering the policy and receiving the premium thereon with notice of the other insurance then existing or thereafter to be obtained, thereby gives its consent to such other insurance and asserted the validity of the policy, and it can not be heard after the loss to say that the policy is void." "This act," says the New York court of appeals, "may be called a waiver or may be treated as an estoppel." (*Pitney v. Ins. Co.*, 65 N. Y., 6.) The company can not play

fast and lose. It can not issue a policy which is valid for the purpose of receiving the premium, but invalid when it comes to pay a loss. * * *

Ample authority is cited in the opinion to support the assertion therein made that "the early doctrine on this subject has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete."

In *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 41 C. C. A., 207 (the case at bar, printed record 38), the doctrine of estoppel was correctly applied in a well considered opinion by Circuit Judge THAYER.

In *London & L. Fire Ins. Co. v. Fischer*, 34 C. C. A., Circuit Judge TAFFT, delivering the opinion for the circuit court of appeals of the sixth circuit, said:

We think the judgment must be affirmed. It is well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or encumbrance without the consent of the company in writing on the face of the policy, if it appears that when the agent of the company, with authority to deliver or withhold policies, delivered the policy in question, while he knew of the existence of the other insurance or an encumbrance. In *Ins. Co. v. Norwood*, 32 U. S. App., 490, 16 C. C. A., 136, 69 Fed., 71, which was decided by the circuit court of appeals for the eighth circuit, it was held that where the agent was advised by the insured at the time of the issuance of the policy that he intended to take out other insurance, the estoppel would apply. Judges Caldwell and Thayer upheld this view. Judge Sanborn dissented on the ground that the rule did not apply to the knowledge of the agent of the intention on the part of the insured to take out other insurance in future, but only to knowledge of existing insurance at the time the policy was issued. But the prop-

osition formulated above and which goes as far as is needed to sustain the charge of the court below, was expressly approved not only by the majority of the court but also by the dissenting judge. Other instances sustaining this doctrine are *Putnam v. Ins. Co.*, 4 Fed., 753 (a decision by Mr. Justice Blatchford, then circuit judge); *Whited v. Insurance Co.*, 76 N. Y., 415; *Insurance Co. v. Hick*, 125 Ill., 361, 17 N. E., 792; *Insurance Co. v. Copeland*, 86 Ala., 551, 6 South, 143; *Patten v. Insurance Co.*, 40 N. H., 375-381; 1 May (3d ed.), 294*c*; 2 May, Ins., 372*c* and cases there cited. There was, therefore, no error in the charge of the trial court upon this point.

McElroy v. British American Assur. Co., 36 C. C. A., 615, and *Palatine Ins. Co. v. McElroy*, 40 C. C. A., 441, are companion cases, decided by the circuit court of appeals for the ninth circuit. The first case cited reviews the authorities and holds to the doctrine that where the agent at the time he writes the policy has knowledge of an encumbrance on the property, or that the assured has procured or arranged to procure concurrent insurance thereon, his knowledge binds the company and it is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provision of the policy in that regard. The case embodies also a direct ruling in favor of the admissibility of parol proofs in such cases.

THE STATE DECISIONS.

Counsel for the company is peculiarly unfortunate in his citation of cases from the court of appeals of *New York* to sustain a forfeiture of the policy in this case. That court has uniformly held, both before and since the adoption of the standard form of policy, to the doctrine of estoppel invoked here by the assured. (*Pitney v. Ins. Co.*, 65 N. Y., 6;

Pechner v. Ins. Co., 65 N. Y., 195; *Short v. Ins. Co.*, 90 N. Y., 16; *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y., 484; *Wood v. American Fire Ins., Co.*, 149 N. Y., 485).

In *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y., 57, cited in the brief of the opposing counsel, the acts occasioning the forfeiture were subsequent to acceptance of the risk and delivery of the policy. The doctrine announced in that case holding the assured bound by his own acts subsequent to the taking out of his insurance, has no relevancy to the point here presented for decision. There the policy was admittedly valid at date of issue but was subsequently rendered invalid by institution of foreclosure proceedings in violation of a policy condition. In *Moore v. Hanover F. Ins. Co.*, 141 N. Y., 219, the other New York case cited in the brief of the company here, a forfeiture was adjudged on like grounds, so neither of these cases furnishes a precedent on the question here under consideration. The assured here does not contend that such policy stipulations are ineffective to work a forfeiture by some subsequent act or conduct of his own. The supreme court of Nebraska might have been cited to the same doctrine (*German Ins. Co. v. Heiduk*, 30 Neb., 288). Yet the Nebraska court, like that of New York, uniformly applies the doctrine of estoppel in cases where the claim of forfeiture is grounded upon some fact respecting the risk actually known to the agent beforehand or at the time of the execution and delivery of the policy. The latest expression of the New York Court of Appeals made since the adoption of the standard policy in that state, is to the effect that the doctrine of estoppel, applicable in such cases, has not been shaken by any decision of that court made since the adoption of the standard policy. We quote only from two cases decided by that court.

In *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y., 484, it was said by MARTIN, J.:

Hence the precise question is whether the policy was valid if the defendant's agent knew of the existence of those facts. Having knowledge of all the facts concerning the property and chattel mortgage, unless he intended to waive the condition of the policy relating to mortgaged personal property, or through mistake omitted to make the proper endorsement, he must have intended to commit a fraud upon the plaintiff. Under these circumstances it is to be presumed that if anything was omitted which was necessary to make the policy valid, it was by mistake, or that the condition was waived, or the defendant held itself estopped from setting it up. * * * The rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it proving the existence of facts which would render it void, where it had full knowledge of them when the policy was issued, is too well established by the authorities in this state to require further discussion. * * * Whether the decisions in this class of cases proceed upon the charitable theory that the insurance company by mistake omitted to make the required endorsement, or intended to waive the provision regarding it; or upon the idea that its purpose was to defraud the insured, and is for that reason estopped, is of but little consequence, as any one of these theories is sufficient to avoid the defense relied upon in this case. That the knowledge of the defendant's agent was its knowledge, is also established by the authorities cited.

In *Wood v. American Fire Ins. Co.*, 149 N. Y., 385, 386, it was said in the opinion by O'BRIEN, J.:

That general agents of an insurance company may waive stipulations and provisions contained in the policy with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it with knowledge of all the facts and receiving

the premium, has long been settled. It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement of the reasons upon which the rule rests is no longer necessary. The principle is not a new one, and it has not been shaken by any decisions of this court made since the adoption of the standard policy. * * * The restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party.

It is true, as asserted by counsel for the company in his brief, that the supreme court of *Kansas*, where the *Norwood Case*, decided in the circuit court of appeals of the eighth circuit, originated, refused to follow the federal holding. It is not true, however, that the Kansas court ruled against the doctrine of estoppel as sought to be applied in the case at bar. On the contrary, that court has expressly held in favor of the contention of the assured here. The court of that state, in the case cited (*Commercial Union Assur. Co. v. Norwood*, 47 Pac., 529), merely distinguished between the cases where there is a knowledge of the existence of the fact at the time of issuing the policy, and cases which relate to some anticipated future action not affecting the validity of the

policy at date of issuance. In that particular, the Kansas court simply adheres to the doctrine obtaining in New York and in Nebraska. From the opinion in the case cited, we quote the following:

We are entirely satisfied with the law as declared in all the cases heretofore decided by this court, cited on behalf of defendants in error. The difficulty in this case is that there is no proof, either of the existence of insurance on the property in excess of the amount authorized at the time the policy was issued, or that the company or its agents was informed at any time before the fire of the full amount of insurance taken out. * * * It was incumbent on the plaintiffs, when seeking to charge the insurance company with knowledge that the property was insured at the time the policy was issued, to an amount exceeding that authorized by the consent indorsed on it, to prove the fact. * * * We think there is a clear distinction between a case where there is a knowledge of the existence of a fact which would avoid the policy, and this in which it merely claimed that there was a prior agreement contradicting the terms of the written contract as to the amount of insurance the party should be permitted to carry. (*Ins. Co. v. Norwood*, 47 Pac. [Kan.], 529.)

The Kansas court has before and since the ruling in *Norwood's Case* uniformly held that where an insurance company had notice at the time a policy was issued of subsisting additional insurance it was estopped from setting up a violation of a clause prohibiting prior additional insurance without its assent. (*Magora Fire Ins. Co. v. Johnson*, 45 Pac., 789; *Home Ins. Co. v. Wood*, 28 Pac., 167; *State Ins. Co. v. Gray*, 44 Kas., 731; *National M. F. Ins. Co. v. Barner*, 41 Kas., 161.

Missouri also has abandoned the rule as announced in that court in the case of *Hutchinson v. Western Ins. Co.*, 21

Mo., 97, cited in behalf of the insurance company in its brief, and now holds to the contrary rule. In his citation of this precedent, counsel has again adopted the odious practice of referring to overruled cases instead of authoritative precedents.

Hamilton v. Ins. Co., 94 Mo., 353, was a case in which the insured had procured policies in two different companies. The agent of the company contesting the loss had notice of the existence of the other insurance. In the opinion of the court by Judge SHERWOOD (p. 368] it is said:

If he (the agent) had notice of other insurance and took no steps to cancel the policy in suit, then the fact of such other insurance would constitute no defense to plaintiff's policy and this upon the familiar principle that notice to the agent is notice to the principal and what the agent waives, the principal cannot afterwards insist upon, and in cases of insurance that an agent when notified gives verbal assent to or makes no objection, the principal cannot afterwards, when suing on the policy, make the point that other or further insurance was not endorsed upon the policy. In such circumstances, failure of literal compliance with the stipulations in the policy will not be allowed to work a forfeiture and the company is wholly estopped from making such a claim. This is the decided tendency of modern adjudications.

In *McCullum v. Hartford Fire Ins. Co.*, 67 Mo. App., 76, Judge BOND, in delivering the opinion of the court, said:

The fact is indisputable that the second policy was procured by plaintiff from the same agent who represented defendant in the issuance of the policy in suit, and who was defendant's agent to issue policies at the time of procurement of the second policy. This effected defendant with notice in law of the fact of the issuance of the second policy and defendant's failure thereafter to signify an intention to cancel its policy or claim a forfeiture by reason of such additional

insurance contrary to its provision, estops it to make such claim in the present action.

It requires some assurance on the part of the counsel for the company to contend in his brief that the ruling adopted by the *California* Supreme Court is in favor of his contention. That court has recently, after a very exhaustive and and full consideration of the authorities, held in harmony with other courts of the country in favor of the application of the doctrine of estoppel to prevent a forfeiture based on facts known to the insurance agent at the time of writing the policy and collecting the insurance premium. This question is no longer open to controversy in that jurisdiction.

Farnum v. Phœnix Ins. Co., 83 Cal., 249-263, is the case referred to in the preceding paragraph. It distinguishes between the effects of acts of agents which operate as waivers of conditions precedent to the attaching of the risk, and the cases in which it has been sought to apply the same rule to subsequent violations by the assured of the policy conditions. The discussion in this case of the powers of local agents generally, entirely dissipates the argument of counsel based upon the two earlier cases cited from that state. In the opinion it is said:

And it has been repeatedly held that where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy as a valid and completed contract is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers of conditions expressed in the policy shall be in writing en-

dorsed on the policy. * * * It is also well settled, that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot by its agents make an oral contract or an oral waiver not forbidden by the statute of frauds.

The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the home office, in the state of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such local agent to bind the company by waiver of any condition precedent to its liability and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it: citing many cases.

While we might content ourselves with the citation of the opinion authoritively settling the matter in California, it is nevertheless worthy of remark that the earlier cases cited by counsel from that state do not, in fact, support his contention. In *Gladding v. California, etc., Ins. Ass'n.*, 66 Cal., 6, the ground of forfeiture was that after the policy was is-

sued, assured permitted a third party to store hay in a shed adjoining the insured property. The policy when issued was admittedly valid, and the ground of contest was based on the subsequent acts of the assured. In the other California case, *Enos v. Sun Ins. Co.*, 67 Cal., 621, the question was whether a policy stipulation against a building becoming vacant or unocupied had been violated, the subject of insurance being a fishing scow. Neither case has any application here.

In *Gardner v. Ins. Co.*, 38 Me., 441, cited in the company's brief in support of its contention, the policy was admitedly valid when executed. A forfeiture was claimed for nonperformance of a rule embodied in the by-laws of a mutual company, requiring the assured to give notice to the secretary of any material increase of risk. The mere statement of the case will show that it does not, in any particular, involve the principle that must determine the present suit. There it was the neglect of the assured, holding a policy valid when issued, to report a subsequent material change in the risk that worked a forfeiture. For many years a statute in Maine has been operative to overthrow the odious rule of forfeiture held in the earlier decisions. Under the statute, the rule in that jurisdiction is in harmony with the contention of the assured in this case. That court has, in fact, been almost intemperate in the severity of its language used to condemn illegitimate practices in underwriting, which took from the assured his premium money, while securing to him nothing better than an unsuccessful lawsuit in addition to the loss of his property. (*Day v. Dwelling House Ins. Co.*, 81 Me., 244; *Packard v. Dorchester M. F. Ins. Co.*, 77 Me., 144; *Caston v. Monmouth M. F. Ins. Co.*, 54 Me., 170; *Emory v. Pescataqua F. M. Ins. Co.*, 52 Me., 322.)

In *Hilton v. Phenix Ins. Co.*, 92 Me., 272, the policy was conditioned that it should be void as to vacant property. It covered two buildings, one of which was vacant, with the agent's knowledge, at the date of issuance of the policy. Judge SAVAGE, in the opinion of the court holding the company liable, said:

There is much more ground for saying that this defendant was deceived by its agent, than there is that the agent was deceived by the plaintiff. Though he had never seen the plaintiff or the premises, the agent reported to his company that he had personally examined the premises "a few days since." We must hold that their agent's knowledge was in law the knowledge of the defendant.

In *Ruthven v. American Fire Ins. Co.*, 92 Ia., 316, cited also in the brief of counsel in support of the company's contention, the question arose after loss as to authority of an agent, empowered to underwrite policies, to bind the insurer by waiver of formalities required in relation to settlement of losses—a matter by uniform usage entrusted to another and a special class of agents. The holding is doubtless correct, but no rule there announced can have any application to the point raised on this record. On the specific point involved in the case at bar, the court of Iowa has held flatly in favor of the contention of the assured, and has applied the doctrine of estoppel in those cases where the breach of the policy conditions rests upon a fact known to the agent and assented to by him at the time he accepted the risk and wrote the policy.

In *Miller v. The Hartford Fire Ins. Co.*, 70 Ia., 704, it was claimed as a defense to the policy that the assured made a false statement as to other insurance. It was developed on the tri[illegible] however, that the agent had knowledge of the other

insurance. In disposing of this point, Judge SEIVERS, in his opinion, said:

It is understood that there was other insurance on at least a portion of the property insured, and it is contended that the assured made a false statement in relation thereto when he applied for and obtained the policy in question. It is by no means certain that any such statement was made. The agent of the company was fully informed as to the existence of the other insurance and the terms and conditions of the policy, and, therefore, we think the company is bound by the knowledge of its agent.

Numerous other decisions of the Iowa court hold to the same or analogous doctrines. (*Bennett v. Council Bluffs Ins. Co.*, 70 Ia., 600; *Myers v. Council Bluffs Ins. Co.*, 72 Ia., 176; *Siltz v. Hawk Eye Ins. Co.*, 71 Ia., 710; *Jordan v. State Ins. Co.*, 64 Ia., 216; *Boettcher v. Hawk Eye Ins. Co.*, 47 Ia., 253; *Miller v. Mutual Benefit Life Ins. Co.*, 31 Ia., 216; *Key v. Des Moines Ins. Co.*, 77 Ia., 174.)

Smith v. Niagara F. Ins. Co., 60 Vt., 682, from which the company's counsel quotes at great length in its brief, involves only a question as to whether there had been a waiver by the company of proofs of loss required by the terms of the policy. The case is not, therefore, a precedent on the point to be determined here.

In *Cleaver v. Traders' Ins Co.*, 65 Mich., 527, cited by the company in support of its contention, the ground of forfeiture was not an existing insurance but a subsequent increase of insurance contrary to the policy stipulations, which it was claimed rendered the policy void, though at the date of its issuance it was admittedly a valid contract. On the second appeal from judgment in favor of the company, the case was reversed for the reason that the trial court refused to submit

the question of waiver to the jury (71 Mich., 414). That court has not in any case held against the rule contended for by the assured in the case at bar.

In *Steele v. German Ins. Co.*, [Mich.,] 53 N. W., 514, there was concurrent insurance of which the agent knew at the time the policy was written but no endorsement permitting such concurrent insurance was made upon the policy itself. In delivering the opinion for the court, Judge GRANT said:

It is the settled rule in these cases that the agents for the insurance companies, in making out these applications, do not represent the insured but the insurer and the consequences of their failure to incorporate the necessary statements in the application must fall upon the insurer and not upon the insured, who has made an honest statement of the facts; citing *Russell v. Ins. Co.*, 84 Mich., 161; 87 Mich., 428; *O'Brien v. Ins. Co.*, 52 Mich., 131.

In *Insurance Co. v. Earl*, 33 Mich., 143, that court held that a written instrument might be changed by parol, notwithstanding a declaration in the policy to the contrary, saying, "A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other and there can be no more force in an agreement by writing not to agree by parol than in a parol agreement not to agree in writing. Each agreement is ended by the new one which contradicts it."

In *Kyte v. Commercial Union Ins Co.*, 144 Mass., 43, as in the New York cases cited by company in its brief, the alleged forfeiture arose out of the conduct of the assured after issuance of the policy. The tenement had been insured as a dwelling. Afterwards it was put to a different use, that of a victualler and vender of intoxicating liquors. The pol-

icy having been valid when issued, and having previously passed from the agent's hands, the limitations upon the agent's authority were very properly enforced; but it is idle to cite the case as a controlling precedent on the facts presented by the record here.

The case of the *North Western National Ins. Co. v. Mize*, 34 S. W. 670 [Tex. Civ. App.], cited to sustain the contention of the company, bears no analogy to the case at bar and involves no principle which could control here. There was a continuing warranty that the insured should keep books of account and an inventory locked in a fireproof safe and, in case of loss, produce them or, in event of his failure to do so, that the policy should be void. The act working a forfeiture was the neglect of the assured and an act which could be performed by him at any time. That court, however, and the court of last resort of that state have both spoken, both before and since the opinion cited, to the precise point at issue in the case at bar and both have held in favor of the contention of the assured here.

In *Wagner v. Westchester Fire Ins. Co.*, 92 Tex., 549, decided in 1899, the opinion reviewed the authorities to some extent and quoted from the previous opinion by the same court in *Assurance v. Endee*, 65 Tex., 123, as follows:

To deliver a policy with full knowledge of the facts upon which its validity may be disputed, and then to insist upon these facts upon grounds of avoidance is to attempt a fraud. This the courts will neither aid nor presume, and when the alternative is to find this or find that in accordance with honesty and fair dealing there was an intention to waive the known ground of avoidance, they will choose the latter. Such issue is tantamount to the assertion that the policy was valid at the time of delivery and is a waiver of the known ground of invalidity.

Answering the objection that the policy in terms limited the agent's authority to act, except by writing, the court said:

It is claimed by the defendant in error that the policy itself prohibited any agent of the company to waive any of its conditions, except it be done in writing. To this proposition our supreme court has made a clear and distinct answer in the case of *Morrison v. Ins. Co.*, 69 Tex., 353, in which it is held that an agent, who has the power to make the contract of insurance, to issue the policy, and, in fact, exercise the highest authority which the law confers upon the corporation, stands in the place of the corporation itself, and that, having the authority to contract, he, no more than the corporation, can be bound to place his contract in writing, because it is a limitation upon the exercise of the authority conferred upon him. *Ins. Co. v. Lee*, 73 Tex., 646. It is not necessary for us to inquire whether these decisions were in accord with the weight of authority when they were made, for we are not inclined to overrule them and change a rule already established which, in the judgment of the court, is salutory and valuable in protecting the rights of those who deal with insurance companies.

In *German Ins. Co. v. Everett*, 18 Tex. Civ. App., 514, decided March 5, 1898, the court of civil appeals of that state held that an insurance company which delivered a policy with full knowledge of the facts upon which its validity may be disputed, cannot afterwards set up such facts as a ground for avoiding the policy. Among the other cases in that state holding to the same doctrine are the following: *Liverpool L. & G. Ins. Co. v. Endee*, 65 Tex., 118; *Morrison v. Ins. Co.*, 69 Tex., 353; *Planters Mutual Ins. Co. v. Lyons*, 38 Tex., 253. In that jurisdiction, as in all others to which the company has referred, the uniform holding is against it and in favor of the assured.

Insurance Co. v. Hebard, 95 Pa. St., 45, cited in the company's brief, involved the breach of a condition subsequent to the taking effect of the insurance contract, and did not involve in any way the principle sought to be applied in behalf of the insurer in the case at bar. On the precise question involved the supreme court of that state has held with the assured and against the insurer in many well considered cases. In its latest decision the doctrine of estoppel here invoked was extended so as to operate against the right of an insurer to claim forfeiture on account of a subsequent increase of insurance which was known to the company. The retention of the premium previously paid, with mere knowledge of the fact that an additional insurance had been written, was held to preclude the company from asserting a forfeiture on account of such additional insurance. (*Kalmutz v. Ins. Co.*, 186 Pa. St., 576.) In the opinion the following authorities are cited: Wood on Ins. (2d ed.), pp. 1162–1163; *Elliott v. Lycoming, etc., Ins. Co.*, 66 Pa., 26; *Wilson v. Ins. Co.*, 174 Pa., 557; *Eureka Ins. Co. v. Robinson*, 56 Pa. St., 256; *Ins. Co. v. Taylor*, 73 Pa., 342; *Light v. Ins. Co.*, 169 Pa., 316.

The supreme court of *Georgia* has recently reaffirmed the doctrine theretofore held in that state that, notwithstanding a policy stipulation requiring other insurance to be endorsed in writing, the contract was valid if the agent of the company, at the time of issuing the policy, knew of the prior insurance upon the property. (*Swain v. Ins. Co.*, 29 S. E., 147.)

The supreme court of *Wisconsin* applies the doctrine of estoppel or waiver to prevent a forfeiture on account of facts known to the company when issuing the policy. In a recent case that court applied the principle to a case where insured

goods were mortgaged and the existence of the mortgage was known to the agent when the policy was written. (*Hobkirk v. Phenix Ins. Co.*, 78 N. W., 160.)

The cases to the point in *Virginia* are referred to in the opinion in *Glover v. Ins. Co.*, decided in the circuit court of appeals for the fourth circuit. The rule in that state is in harmony with the contention of the assured in this case. That court, in a recent case, said:

Ward, knowing that he had truthfully represented to the agent of the company the existence of other insurance upon his property, had a right to assume that the agent had done his duty by communicating all necessary information to his principal, or that, whether communicated or not, the knowledge of the agent would be imputed to the company. Upon this point we are of the opinion that the insured, having at the time of his application for insurance communicated to the agent through whom the policy was obtained, all the facts material to the risk, the company is estopped to enforce the forfeiture, provided for by Article 5 of the policy, although its agent may have neglected to communicate his knowledge to the company and though the policy was issued in ignorance of the facts. (*Mutual Fire Ins. Co. v. Wood*, 28 S. E., 209.)

The courts of *Illinois* refuse to declare forfeitures in favor of insurance companies, based upon any fact known to the agent writing the policy when the same was issued. (*Ins. Co. v. Luttrell*, 89 Ill., 314; *Ins. Co. v. Steiger*, 26 Ill. App., 228; *Ins. Co. v. Swigert*, 11 Ill. App., 590; *Ins. Co. v. McDowell*, 50 Ill., 120.)

The *Minnesota* supreme court has held repeatedly that an insurance company by delivering a policy, knowing of the existence of concurrent insurance, waived the policy condition prohibiting such concurrent insurance except by in-

dorsement in writing on the policy. (*First National Bank v. Ins. Co.*, 58 Minn., 492; *Brandup v. Ins. Co.*, 27 Minn., 393.)

In *Insurance Company of North America v. Coombs*, 49 N. E., 471, the supreme court of *Indiana* held the rule contended for by the insured here. In the opinion of COMSTOCK, J., it was said:

The special verdict showed that the agent for the appellant company was also agent for the Ætna company and that he had possession of the policy for the purpose of doing whatever was necessary to entitle appellee to secure additional insurance; the knowledge of the agent of appellant company was, under the circumstances, knowledge of the appellant, and it must be held to have been taken with consent of appellant company. There is no finding that there was any fraud on the part of appellee in obtaining the insurance.

In *Collins v. Farmville Ins. & B. Co.*, 79 N. C., 279, the insurance was obtained from an agent who represented two companies and who wrote two policies, covering one stock of goods. The company at that time gave consent to concurrent insurance, but the other insurance was afterwards changed to another company by its own agent. The North Carolina court held the company liable, notwithstanding the failure to endorse upon the policy consent to the substitution. The court applied the equitable doctrine of estoppel against assertion of forfeiture under a policy condition based upon a fact known to the company when the policy was written. The same rule has since been applied in the case of *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C., 472.

The supreme court of *South Carolina* in *Gaady v. Orient Ins. Co.*, 29 So., 655, in its opinion by JONES, J., said:

The question before us is whether the principal is estopped by conduct to assert a forfeiture, the assertion of which is inconsistent with the principal's conduct in accepting the premium and delivering the policy as a valid policy when, if the forfeiture was intended not to be waived, such policy would be void at its inception. On this question we do not see room for two opinions; the knowledge of the agent, acquired within the scope of his agency, is imputable to the principal. There is evidence tending to show that the agent had full power to solicit insurance, receive premiums, and write and countersign and deliver policies of insurance. There is nothing to suggest any limitation of the agent's powers in these regards. The receipt of the premium and the delivery of the policy were acts of the principal.

The South Carolina court has repeatedly held the same doctrine in other cases. (*Schroeder v. Springfield Fire Ins. Co.*, 51 S. C., 180; *McBride v. Ins. Co.*, 33 So., 729).

The *Nebraska* court has repeatedly held that where an insurance agent with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance, the company is estopped to insist that the policy is void because consent to such concurrent insurance was not given in writing. (*Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German-American Ins Co. v. Covey*, 41 Neb., 728; *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566.

It is to be regretted that the adverse experience of counsel in the court of last resort of his own state has led to the undignified reference at page 6 of his brief to that court. We have abundantly shown justification, in respectable precedent, for the conclusion which that court has reached. Had counsel been conscious of the possible error in his own

judgment, as to the proper interpretation of an insurance contract, or even as to a proper conception of good business morals, as applied to the transaction involved in his cause, he might easily have refrained from the use of intemperate language in characterizing these courts which held against him as "courts like those of Nebraska, whose conception of an insurance policy is that it is a promissory note payable in case of fire." In this disparagement of the court of his own state, it is probable that counsel has erred and that his statement is an inaccuracy, of the same character as that made at page 17 of the same brief in referring to rulings of this court as "the decisions of this supreme tribunal of the world," by which, in his exuberent and fulsome praise, he has included some people and some territory in the jurisdiction of this court, over whom we may say, without any disparagement, this court exercises no authority.

We have not undertaken, in this review of the authorities, to refer to all the decisions to the point, nor yet to decisions in every state. Where omissions have been made, however, cross-references by the courts will be found in the opinions from which we have quoted. Our aim has been to go sufficiently into the question to demonstrate that there is a practical unanimity of opinion in favor of the application of the equitable doctrine of estoppel to transactions of the character disclosed between the insurer and the insured in the case at bar. The unanimity of opinion among text writers is no less striking. Below we quote from the four leading text writers on the subject of insurance.

AUTHORITY OF STANDARD TEXT WRITERS.

In 2 WOOD on Insurance (2 ed., pp. 908–910), the author, after an extended review of decisions, says:

It may be stated as a general rule that where the agent effecting insurance knows the situation and condition of the risk or its incidents or uses or the existence of conditions, uses or incidents that conflict with the conditions of the policy, and fails to provide therefor, his knowledge is the knowledge of the company, and the company cannot set up such matters in avoidance of the policy, and this applies to all matters such as incumbrances upon the property, or interest of the assured therein, the value of the property, the existence of other insurance, and every and any matters that it would have been the duty of the insurer himself to have provided for in the policy, if the matters known to the agent had been, in fact, known by him. The principle that an insurer, who contracts with full knowledge of the facts that constitute a breach of the conditions of the policy, is estopped from asserting them to defeat his liability thereon is predicated upon the rules of fair dealing, sound morality, and is in consonance with requirements of the most healthful public policy. It is the duty of the insurer under such circumstances to so frame the policy as to be operative in view of the circumstances existing in relation to the risk and known to him, and, failing to do so, the courts, acting upon the presumption that he intends to deal honestly, will treat him as having waived the conditions of the policy, so far as they operate to defeat liability, in view of the facts known to the insurer prior to the time when it was made. And in all cases the knowledge of the agent is to be imputed to the principal.

In 2 MAY on Insurance (4 ed., sec. 497, p. 1182), the author says:

To deliver a policy with full knowledge of the facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the

courts will neither aid nor presume; and when the alternative is to find this or to find that, in accordance with honesty and fair dealing, there was an intention to waive the known ground of avoidance, they will choose the latter. Such an issue is tantamount to an assertion that the policy is valid at the time of the delivery and is a waiver of the known ground of invalidity. So is the issue of a policy upon an application to a question in which no answer is given.

Mr. MAY in the same work, in section 499, citing the case of *Union Mutual Insurance Company v. Wilkinson*, 13 Wall., 222, says that the supreme court of the United States has at last thrown the great weight of its authority into the scale in favor of this doctrine of equitable estoppel.

In 1 JOYCE on Insurance, sec. 515, the author says:

As a general rule, notice to the agent and knowledge obtained by him while acting in the scope of his authority, is notice to the principal. So an insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, if at the time it was so issued, the fact of such violation was known to the company or its duly authorized agent.

Judge OSTRANDER, in his work on Insurance, states the rule as follows:

When it is required by the terms of the policy that both prior and subsequent insurance must be disclosed to the company, and that, failing to do so, the insurer will not be liable for the loss, it has been generally held that where other insurance was existing at the time of the writing of the policy in suit, and was known to the agent of the company who wrote it, the insurer will be estopped from setting up such other insurance in a defense to a claim for loss, notwithstanding no notice and consent had been expressed in writing. This has been held with great uniformity, in disre-

gard of the stipulation in the policy that no agent of the company has authority to waive any of its conditions, except by distinct and specific agreement indorsed thereon. The courts appear to have based their decisions upon the equitable principle that the insurer, having accepted the premium with full knowledge of the other insurance, ought not to be permitted to escape performance of the obligation it has assumed, and for which it has received the consideration demanded. If there be two or more policies in different companies covering on the same property, written at one time and by the same agent, although on neither of the policies is indorsed permission for additional insurance, neither of the companies will be discharged because of the other insurance. Knowledge of the agent will be imputed to the company, and that which the insurer knew when engaging in the venture it will be presumed to have consented to. (Ostrander, Fire Ins., sec. 243, pp. 554, 555.)

We have taken liberty to use the above paragraph because the published work appears to be as authentic a source from which to ascertain Mr. Ostrander's views, as that to which counsel for petitioner directs the court at page 47 of his brief.

Since the decision in *Wilkinson's Case* (13 Wall., 222), it has been supposed that the great weight of the opinion of this court was thrown in favor of the application of the equitable doctrine of estoppel, in the practice of the common law courts to prevent unconscionable claims of forfeiture, when the grounds upon which the forfeitures were claimed were known to the insurer at the time the policies were issued. After the lapse of many years, and when the salutary rules announced in that case have at last been universally recognized and applied, the court is asked to re-write the law of insurance and to cut away the wholesome growth of the last sixty years; or at least to establish a rule for the guidance of the federal judges, at variance with the doctrines held by

the courts of almost every state. We fail to see in the suggestions made by the company's counsel, at page 6 of his brief, anything that should appeal to this court for a reversal of the judgment rendered below. Contrary to the suggestion of counsel, the fact is that perhaps not a state in the Union is without its own local insurance companies, which it fosters and encourages by appropriate legislation. The rule adopted by the inferior courts in this particular case is not a discrimination against foreign insurance companies, but is the rule adopted by the state court against the Home Fire Insurance Company of Omaha, a corporation organized under the laws of Nebraska, in a controversy to which both parties were residents of that state. In cases of this character the federal court obtains jurisdiction only on account of diverse citizenship. While this court may not feel bound to follow the decisions of a state court on a matter of commercial or general law, yet it, nevertheless, would be unfortunate if, by holding to a different doctrine, foreign companies doing business in this jurisdiction should become favored suitors and escape burdens which, under the rulings of the state court, are imposed upon domestic corporations engaged in the same identical line of business. The foregoing review of authorities indicates that such would be the effect of the reversal of the judgment of the circuit court of appeals in this case, not only as to the relative rights of domestic and foreign companies in Nebraska, but that it would affect similarly their relations in almost every state in the Union. While we hold that the doctrine maintained by the state courts is intrinsically correct and is salutary in securing good business methods, we still think that on a question involving no federal rights or laws, and in which jurisdiction is acquired solely on the ground of diverse citizenship, even this court

might be constrained to yield on a point of commercial law to the concurrent views of the courts of practically all the states.

The justice of the rule held in the circuit court of appeals is so manifest, and the courts of the country, state and federal, have so universally applied it in similar cases, that it should not now be overturned in this court.

III.

The facts found are sufficient to sustain the judgment.

In view of the fact that the case comes here, after right to prosecute error or appeal is exhausted, by writ of certiorari from this court, to settle a question of law in the interest of uniformity of decision, it would seem to be asking very much to insist upon this court examining into the sufficiency of the findings as to form, or of the evidence on which the findings rest. These points, however, have been made by counsel for the insurance company, although not involved in the question of law on which the circuit courts of appeals have divided.

It is contended now that the facts in issue upon the questions of waiver and estoppel are not found. The jury found that the subsisting, concurrent insurance of $1,500 in the Firemen's Fund Insurance Company had, on behalf of the insured, been reported to the agent who wrote the policy, and was known to such agent when he issued and delivered the policy sued on. These are the ultimate facts out of which the waiver or estoppel pleaded arises. It is true plaintiff's pleadings alleged also the legal inference or conclusions from these facts, that in law they constituted a

waiver of the policy condition against other insurance, and estopped the company to claim a forfeiture on that ground. The answer denied these averments, and alleged that plaintiff, in violation of the policy stipulation, "and without the knowledge of defendant," procured the issuance of the further policy of $1,500. The facts in issue were whether the additional policy was existing when the policy in suit was issued, and whether its existence was known to the agent of the company when he issued the policy sued on. The verdict responds directly and unequivocally to these issues, and sets forth the ultimate facts necessary to determine the applicability of the law of waiver and estoppel to the case. The facts are, therefore, sufficiently stated on the record to refer to the court the consideration of the question of law. This fulfills the requirements of a special verdict. The legal inference or conclusion as to whether these facts operated as a waiver or estoppel was for the court to determine. That was purely a question of law, which was contested; and in order to afford the court time for deliberate investigation, he expressly reserved it at the trial by this procedure.

We have no contention to make as to correctness of the general doctrines enunciated in the cases referred to by plaintiff in error under this point. We admit the verdict should respond to the issues; and that the question for review upon a special verdict is whether the facts found are sufficient to support the judgment. But, measured by these tests, the verdict is good. Imagine the court throwing upon the jury the responsibility of determining the law of the case by answering directly the question, "Is the defendant estopped to claim a forfeiture?" The answer to such a *quære* would be of no validity, unless the ultimate facts in issue, on which it was based, were also found. If the facts pre-

cluded such an inference, in law, then the facts would control, and the erroneous inference drawn would be treated as surplusage by the court.

In *Moukhouse v. Hay*, 8 Price, 256, decided as early as 1826 in the exchequer chamber of England, the test of a special verdict was held to be wheather sufficient facts are stated on the record to refer to the court the consideration of the question of law.

In *Conner v. Citizens St. Ry.*, 105 Ind., 62, it was specifically ruled that it is not the province of the jury, in returning a special verdict, to draw inferences or conclusions from the facts found. When the jury find and return a special verdict, it must then be considered that the facts in the case are no longer in dispute. And the special verdict is good if it state facts sufficient on the record to refer to the court the consideration of the question of law.

There is no merit in the suggestion that a letter written by a foreign agent of the company, after loss, and after receipt of proofs, conclusively negatives any inference of waiver or estoppel. If that were the rule, defenses of this character would be readily relieved of all embarrassment. In fact, the letter, quoted at page 50 of petitioner's brief, was admissible in evidence only as an admission against the company's interest. A rule enforced in many jurisdictions is that when the company, after claim is made, puts its objection to paying the loss on a certain specific ground, it is, when suit is afterwards brought, limited to that defense. Plaintiff in his petition averred that the company had denied liability on the sole ground that its policy had never taken effect, owing to the other $1,500 policy; and at trial, to avoid necessity of showing in detail compliance with many policy conditions, introduced this letter, which was received with-

out objection. That, in counsel's opinion, it is a good letter, may justify him in thus pressing it upon the attention of the court; but no point is made on it, and it is not assigned for error that the evidence is insufficient to support the findings. The judgment should be affirmed.

Respectfully submitted,

HALLECK F. ROSE,
Attorney for Defendant.

LINCOLN, NEBRASKA, March 12, 1901.

Joseph R. Webster,
Of Counsel.